PHILIP SAYER

IBLA 79-107 Decided August 27, 1979

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting amended certificates of location for 32 mining claims filed for recordation to the extent that they purport to be original locations as of the date of posting, and declaring the claims null and void ab initio. AA-13540 through AA-13571.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Generally -- Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Generally -- Mining Claims: Abandonment -- Mining Claims: Recordation

   Sec. 314 of the Federal Land Policy and Management Act of 1976 was enacted to establish a Federal recording system for mining claims to facilitate Federal land use planning and management. Failure to comply with the mandatory filing requirements constitutes abandonment of the claim and the land reverts to the status of public domain.

2. Federal Land Policy and Management Act of 1976: Generally -- Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Generally -- Mining Claims: Possessory Right -- Mining Claims: Recordation

   In the absence of a specific regulation or policy directive specifying the type of proof necessary for recordation, the Bureau of Land Management should liberally consider attempts by a mining claimant under sec. 314 of the Federal Land and Policy Management

> Act to record notice of a mining claim where proof of recording cannot be made and 30 U.S.C. § 38 is relied upon for holding the claim, and before rejecting a filing for such a claim, BLM should request further evidence from the claimant which it would consider satisfactory. Such evidence should include at a minimum the name the claim is and has been known by, the name and address of the claimant, an adequate description of the claim, the type of claim, the time of holding and working the claim to meet a state's statute of limitations and, if possible, the date of the origin of claimant's title and facts as to continuation of possession of the claim, and any other information available showing a chain of title to the claimant and bearing upon the possession and occupancy of the claim for mining purposes, and other information which the Bureau of Land Management deems essential to meet the purposes of the recordation provision.

APPEARANCES: Earl M. Hill, Esq., Hill, Carsas, de Lipkau, and Erwin, Reno, Nevada, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Philip Sayer appeals from the November 1, 1978, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting 32 mining claim recordation filings and declaring the claims null and void to the extent that they purport to be original locations as of 1977. These placer claims are located in T. 28 S., R. 12 E., Kateel River meridian, Alaska, and were serialized AA-13540 through AA-13571.

On July 21, 1977, appellant filed copies of recorded, amended certificates of location for 32 placer claims with BLM in an attempt to comply with section 314(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2743, 43 U.S.C. § 1744(a) (1976). 1/ These certificates state: "This amendment relates back to

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1/ Section 314(a) provides:

"Section 314. (a) The owner of an unpatented lode or placer mining claim located prior to the date of this Act shall, within the three-year period following the date of the approval of this Act and prior to December 31 of each year thereafter, file the instruments required by paragraphs (1) and (2) of this subsection. . . .

"(1) File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim (including but not limited to such notices as are provided

the original date of location and, if required by law, may be considered an original location as of the date of posting a copy hereof on the claim." The certificates stated in the second paragraph that the "claim was originally located by the undersigned or his predecessor in interest on or about 1908 . . . ." The certificates also declare: "The official record of said original recording is or may now be imperfect, incomplete, or nonexistent due to the failure of the then Recorder of said mining district to perform his duty, or to loss or casualty destruction of said official record, or all such causes."

Appellant enclosed a check for $160 in filing fees and informed BLM that mineral survey applications had been filed for these claims (serialized AA-13269 through AA-13274). He stated that he filed these applications as part of the process for obtaining patents. He stated he felt the survey applications constituted compliance with section 314 of FLPMA and these filings were redundant and needless.

The State office found the amended certificates of location insufficient to meet the requirements for recordation of mining claims as provided in 43 CFR Subpart 3833. Specifically, BLM held that if appellant intended to hold the claims by adverse possession, he must file a certificate of location indicating this intention and copies of the original location notices of record. If the records have been lost or destroyed that should be specifically indicated and accompanied by supporting evidence as contemplated by 43 CFR 3862.1-4.

BLM found that the amended certificates did not provide the information required by 43 CFR 3833.1-2, particularly as to date of location. It was noted, and appellant concedes, that the regulation permitting an application for survey to be treated as an acceptable application for patent, 43 CFR 2650.3-2(b)(1), is inapplicable here.

The lands involved are within the boundaries of State selection F-15307 (Anch.), filed February 1, 1972. BLM held that this selection segregated the lands from appropriation under the mining laws and rejected the amended certificates of location to the extent that they purported to be original locations. For this reason the claims were declared null and void ab initio. The decision emphasized that it did not decide the validity of earlier locations or evidence of possessory rights gained predating the State selection application, nor would it affect appellant's mineral survey applications.

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fn. 1 (continued).
by law to be filed when there has been a suspension or deferment of annual assessment work), an affidavit of assessment work performed thereon, on [sic] a detailed report provided by the Act of September 2, 1958 (72 Stat. 1701; 30 U.S.C. 28-1), relating thereto.

"(2) File in the office of the Bureau designated by the Secretary a copy of the official record of the instrument filed or recorded pursuant to paragraph (1) of this subsection, including a description of the location of the mining claim sufficient to locate the claimed lands on the ground."

Appellant advances numerous reasons for appeal. First, he asserts the amended certificates of location were made and recorded in conformity with the Alaska Mining Law. He claims these certificates "complied substantially" with the requirements of section 314 of FLPMA and regulation 43 CFR 3833.1-2. Appellant points out that section 314 requires all claimants to file a copy of the official record of the notice or certificate of location "and makes no exception for those owners who may hold claims by reason of adverse possession under 30 U.S.C. 38. Thus, Appellant can't wait until regulations are modified to provide a procedure for such owners to record their claims." Statement of Reasons, p. 2.

Appellant next states that the regulations implementing section 314 of FLPMA do not require appellant to file new certificates indicating the fact of adverse possession and provide evidence of lost or destroyed records nor was BLM required to reject the amended certificates. Appellant included alleged copies of original certificates of location for 25 of the claims and stated he could, on request, submit evidence of lost or destroyed records for the other 7, making it clear he did not believe the regulations or law required any of this. 2/

Appellant states the decision errs in treating the amended certificates as original locations as of the date of posting, June 3, and/or 4, 1977. He points to the language in the amended certificates, quoted above, which limits such treatment by the phrase "if required by law." He asserts that the decision rejecting the filings and declaring the claims null and void is premature. Finally, appellant suggests that an application for mineral survey should be tantamount to a mineral patent application, and should fulfill the requirements of section 314. Appellant requests that the decision be reversed and remanded to BLM for further action.

[1] In several respects we agree with appellant and in others we disagree. First we note generally that section 314 of FLPMA was enacted to establish a Federal recording system for mining claims to facilitate Federal land use planning and management. Failure to comply with the mandatory filing requirements constitutes abandonment of the claims and the land reverts to the status of public domain. Solicitor's Opinion, M-36889, 84 I.D. 188 (May 17, 1977); Al Sherman, 38 IBLA 300 (1979). It is not sufficient that appellant has complied

2/ In some respects the filings with the appeal would appear to moot some of the matters raised by appellant with respect to the 25 claims. However, there remains the basic issue regarding the other 7 claims as to the proof necessary where records have been lost or destroyed and appellant's contentions concerning the type of proof to be recorded where a claim is held pursuant to 30 U.S.C. § 38 (1976). Accordingly, as the matter is of some importance in administering the recordation provisions, we shall address the issue. Also, there is the question as to the proper procedure BLM should follow where it is asserted that the claims are being held under 30 U.S.C. § 38 (1976).

with the State mining law. He is still required to comply with the provisions of FLPMA. See 43 CFR 3833.0-2; United States v. Tappan, 25 IBLA 1 (1976).

Prior to BLM's decision appellant, in a letter dated November 23, 1977, had indicated that application for mineral patents of the claims would be filed later in which he would rely on 30 U.S.C. § 38 (1976) and 43 CFR 3862.1-4, which pertain to the holding of a mining claim for the period of a state's statute of limitations and proof of such adverse possession which would be essential to establish the claimant's claim where records of the location of the claim had been lost or destroyed. He indicated that it would be difficult, if not impossible, because of the nature of the records concerning the claims to establish a complete chain of title.

As appellant has indicated, there has not been a regulation promulgated to implement the recording provisions of FLPMA specifically addressing the situation where a claimant intends to rely on 30 U.S.C. § 38 (1976), rather than showing the notice of location of the claim recorded under state law. Where a claimant is attempting to record claims being held under that provision, the problem is what must be shown, and what BLM's actions should be if it decides there is not a sufficient showing.

Although regulations have not been promulgated, the problem has been addressed in a BLM Organic Act Directive (OAD 79-7) dated November 24, 1978, where it is pointed out that the purpose of section 314 of FLPMA "is to ensure that all mining claims, millsites, and tunnel sites are reflected in the land records." 3/ The directive goes on to state the type of evidence which may be acceptable:

3/ This purpose is clearly reflected in the legislative history of the recording provision in FLPMA. See, for example, S. Rep. No. 94-583, 94th Cong., 1st Sess., on S. 507, a companion to the bill which was ultimately enacted. On page 64 of the report, it is pointed out that the status of hardrock mining claims is one "of the most persistent and significant roadblocks to effective planning and management of most Federal lands." On page 65, it indicates that the proposed subsection "would require that all mining claims under the 1872 Mining Law, as amended, be recorded by the claimants with the Secretary within 2 years after the enactment of S. 507." The House version of the bill, with adjustments at conference, was passed changing the place of recordation, the time, and certain other specific provisions, but it had the same essential purpose and thrust. See H.R. No. 94-1163, 94th Cong., 2d Sess. on H.R. 13777, at p. 11, and Con. Rep. No. 94-1724, 94th Cong., 2d Sess. on S. 507, where at p. 62, it was stated: "24. Both the Senate bill and House amendments provided for recordation of mining claims and for extinguishment of abandoned claims. The conferees adopted the more specific House amendments with one perfecting amendment."

> Where a search of the local (county or recording district) records, therefore, does not reveal the original filing, but does show that there is reason to believe that a recording may have been made, secondary evidence will be accepted. . . . [This] includes, but is not limited to, such things as a history of annual assessment work recordings, recorded grants to the present owner, or wills showing that the claim was inherited by the present owner or a predecessor in interest. The above items are described in 43 CFR 3862.1-4 In 43 CFR 3862.3-1 the means of establishing a right by occupancy is described. Where the above described documents cannot be produced, a right by occupancy will be accepted.

The directive then instructs BLM personnel to accept the material, with the filing fee, and make a subsequent review of the material to determine whether or not it is sufficient. If a decision cannot be made as to its sufficiency the case will be referred to the Director of BLM for a final decision.

The language in the directive is not crystal clear, however. It appears to say that if secondary evidence establishing an original filing cannot be made, proof of a right by occupancy, as described in 43 CFR 3862.3-1 will be accepted. The BLM decision being appealed, however, went further than the directive by requiring evidence "contemplated by 43 CFR 3862.1-4" which would pertain to lost or destroyed records. It did not suggest that the type of evidence permitted under 43 CFR 3862.3-1 where a claim is held by adverse possession would be sufficient. Both regulations, 43 CFR 3862.1-4 and 3862.3-1, pertain to patent applications, and to proof where an original notice of location cannot be shown.

The provision at 30 U.S.C. § 38 (1976) is not usually invoked or becomes relevant unless a patent application is filed since it permits patent upon evidence of possession and working of a mining claim for a period of time equal to the time prescribed by the statute of limitations in the state where the claim is situated. In some nonpatent cases, however, we have noted the possibility that the provision could be used to show the validity of a claim located before some segregative action affecting the land status. See, e.g., Gardner C. McFarland, 8 IBLA 56 (October 13, 1972). Proof of a discovery of a valuable mineral deposit is also required for the claim to be valid. Because there is a gap in the recording statute and the regulations currently concerning proof that a claim is being held under this provision of the mining laws, BLM should liberally consider attempts by claimants to record evidence of such claims. We agree with appellant that it was premature for BLM to take the action it did in rejecting the notices filed by claimant where BLM had been informed claimant was relying on 30 U.S.C. § 38 (1976).

Although it was appropriate for BLM to give notice that mining claims located after the segregation of the lands by the State selection would be null and void, as it was clear appellant was claiming under claims located prior to that date, he should have been afforded the opportunity first to supply the information deemed essential to meet requirements for recording before adverse action was taken on the claims in any respect. Also, in view of the gap in the regulations, we do not believe appellant should be subjected with the necessity for paying additional filing fees to make new recordings, but that he should have been called upon to make any supplemental showings of information as required by BLM. Therefore, instead of rejecting the notices, BLM should first have called upon the claimant for the type of evidence it would have considered satisfactory.

The notices originally filed with BLM did show that they were amendments of earlier notices. However, they did not specifically show that the claimant was holding and relying on 30 U.S.C. § 38 (1976). A subsequent letter from the claimant, however, did give that information. In the absence of specific regulations governing the type of evidence sufficient to show the holding of the claim for the purposes of the recordation statute, it is proper for BLM to look to the analogous regulations requiring proof for a patent as a guide to the type of evidence which should be acceptable. However, unless required by other regulation or policy directive, it does not appear essential to require all the proof necessary to meet the requirements of the patent regulations. It is also proper to look by analogy to the information required by amended regulation 43 CFR 3833.1-2(c), 44 FR 9720 (February 14, 1979), applicable where state law does not require recordation. That regulation is not otherwise applicable here as Alaska requires recordation. Alaska Stat. § 27.10.050.

As indicated, supra, the purpose of the recording provisions in FLPMA is essentially to give notice to BLM of the existence of mining claims on Federal lands so that this information may be considered in the land use planning and management of those lands. To serve this purpose then, there is some essential information that would be necessary where a claimant cannot show proof that a notice of location was recorded. 4/ This would include the following: (1) the name under

4/ Although section 314(b) of FLPMA provides that the owner of an unpatented mining claim must file with the appropriate BLM office "a copy of the official record of the notice of location or certificate of location," current regulation 43 CFR 3822.0-5(i), as amended at 44 FR 9720 (February 14, 1979), defines that term as meaning "a legible reproduction or duplicate, except microfilm, of the original instrument of recordation . . . which was or will be filed in the local jurisdiction where the claim or site is located or other evidence, acceptable to the proper BLM office, of such instrument of recordation. It also includes an exact reproduction, duplicate or other acceptable evidence, except microfilm, of an amended instrument which may change or alter the description of the claim or site." Of course, a filing which meets these requirements would suffice.

which the claim is presently identified and all other names by which it may have been known to the extent possible; (2) the name and address of the present claimants; (3) an adequate description of the claim; (4) type of claim; (5) information concerning the time of the state's statute of limitations and a statement by the claimant as to how long the claim has been held and worked, giving, if possible, the date (or at least the year) of the origin of the claimant's title and facts as to continuation of possession of the claim; and (6) any other information the claimant would have showing the chain of title to him and bearing upon the possession and occupancy of the claim for mining purposes. Other information which BLM deems essential to meet its purposes may also be required. The above information would set the minimal requirements to be satisfied until regulations are issued specifically addressing the problem of a holding of a claim under 30 U.S.C. § 38 (1976).

Appellant, although recognizing that 43 CFR 2650.3-2(b)(1) and 2650.3-2(c) are not applicable, contends that in Alaska, an application for mineral survey should be tantamount to a mineral patent application and should be subject to 43 CFR 3833.1-3 which indicates when recordation is not required, and that the same principles should be applied nationwide. This contention, in effect, is a call for rulemaking not within the province of this appeal Board. Appellant may make his suggestions to appropriate Departmental officials involved in promulgating rules and regulations.

As previously indicated, appellant has submitted 25 copies of purported original notices of location. These will be considered by BLM when the case files are returned to it. We note only that insofar as some of the notices show dates of original locations after the segregation of the lands they may be subject to adverse action by BLM unless appellant can show a holding and working of the claims under 30 U.S.C. § 38 (1976) prior to that time or otherwise that they are amendments of claims located and held prior to the segregative date.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded to the BLM State Office in Alaska for appropriate action consistent with this decision.

Joan B. Thompson
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge